

University of Miami Law Review

Volume 65
Number 2 *Volume 65 Number 2 (Winter 2011)*
*SYMPOSIUM: What Change Will Come: The
Obama Administration and the Future of the
Administrative State*

Article 2

1-1-2011

Keynote Address

Carter Phillips

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Carter Phillips, *Keynote Address*, 65 U. Miami L. Rev. 321 (2011)
Available at: <https://repository.law.miami.edu/umlr/vol65/iss2/2>

This Keynote Address is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

University of Miami Law Review

VOLUME 65

WINTER 2011

NUMBER 2

KEYNOTE ADDRESS

CARTER PHILLIPS*

Thank you, Dean, I appreciate that introduction very much. First of all, let me thank the Law Review for inviting me here. It's a wonderful opportunity. Some of you already know this; I'm now snowed "out" of D.C. It turns out I can't get back to Washington, so I'm going to have to "suffer the difficulties" of staying in Miami for another day. I think I'll get over that. My wife may have a different take on how lovely this was, but I'm pretty happy about it.

You know, when I was told the topic is "What change will come in administrative law?", I thought that I would do what my son did a few years back. He and former Solicitor General Rex Lee were very close friends. Rex was at a brunch with our family, and he was getting ready to go to a PBS program where he was going to talk about the upcoming Supreme Court term. Ryan was about six years old at the time, and the idea of somebody on television excited him greatly. He said, "Well, take me with you! I want to go on TV and be with you!" And Rex said, "Well, Ryan I'm going to go on TV and I'm going to talk about the Supreme Court. I mean, what would you want to say in that circumstance?" And Ryan said, "Well, I'd tell them I'm not talking about that stuff! I'm talking about Star Wars!"

So, I am not talking about that stuff. I am going to talk a little bit about a couple of institutions, and I am going to try to be at least tangentially relevant to the administrative law theme, today, but probably only tangentially relevant. And what I would like to talk about is, roughly, the

* Mr. Phillips is the Managing Partner of the Washington, D.C. office of Sidley Austin LLP. He served as a law clerk to both Judge Robert Sprecher of the U.S. Court of Appeals for the Seventh Circuit and Chief Justice Warren E. Burger of the United States Supreme Court. Mr. Phillips served as Assistant to the Solicitor General for three years, during which time he argued nine cases on behalf of the federal government in the United States Supreme Court. Since joining Sidley Austin, Mr. Phillips has argued fifty-six cases in the Supreme Court, for a career total of sixty-six appearances, and has argued more than eighty cases in other appellate courts.

role and significance of two institutions in the development of any change in administrative law that is to come. The two I have in mind—this will come as no surprise since you’ve heard my introduction—are the Solicitor General, and his or her role in how any change would play out, and then the Supreme Court, and what is likely to happen to administrative law in that forum. And I realize, on the Supreme Court side, that I am going to step on somebody’s toes because somebody else either has talked about or plans to talk about the *Fox Television* case. I have to confess, however, that case is very near and dear to my heart since I argued it in the Second Circuit, in the Supreme Court, and two weeks ago re-argued the case when it went back to the Second Circuit. So, I cannot resist the temptation to talk about it, although I will probably resist the temptation to use expletives here—a temptation that I did not resist in either of my arguments in the Second Circuit. (If you want to see them, you can get both broadcasts on the web. CSPAN has it, so if you want to see expletives being used in a federal court of appeals, they’re there for you to take in. I do not recommend it as a matter of course if you’re an appellate advocate; but in this very narrow circumstance, it seemed appropriate and it worked.)

Part of the reason that I can make comments about the Solicitor General’s role with a fair amount of confidence has already been explained by the dean. I did start my Supreme Court practice in the Solicitor General’s office with the Carter administration. His Solicitor General was Judge Wade McCree, a wonderful, wonderful judge who has since passed away, and then I stayed on through the transition when Rex Lee became the Solicitor General in the Reagan administration. It was fascinating to watch that change. What was particularly interesting was how the Solicitor General’s office handled that transition, and I assume the same approach will be taken in this administration because the institutional memory of the office is powerful and will ensure that things will not change. During the change-over, a situation that arose, not uncommonly, was that cases would come before the office involving regulations or other orders adopted by the Carter administration that were viewed by the business community as “insufferable.” That’s probably the best word you could use for it. I will not use the expletives used by the business advocates who came to the Solicitor General’s office. A lot of those rules and regulations were upheld by the courts of appeals, mostly by the D.C. Circuit, but some of them were upheld in other courts as well. And so, the business community then would seek certiorari review by the Supreme Court of the D.C. Circuit or other courts of appeals’ rulings. Their advocates would appear in the Solicitor General’s office saying, “Look, you argued in defense of this rule in the D.C. Circuit. That was the Carter administration. This is the Reagan administra-

tion. We supported your election and, therefore, we believe that you should support our position at this point. So you should confess error, or otherwise allow the Supreme Court to grant our petitions for certiorari, so that we can have an opportunity to eliminate all of those rules. And this will be clean, and swift, and easy.”

Now, the position that Rex took, and I admire him greatly for it, was: That’s not what we’re in the business of doing—that when the United States government takes a position in one court, it does not generally take the opposite position in another court simply because the person in the Office of the Presidency has changed. He believed that doing so would send an extraordinarily bad message and certainly offend his notion that the Solicitor General is the tenth justice, who is there to promote justice in front of the United States Supreme Court.

I can personally remember a number of instances in which this view of the Solicitor General’s role won out. Erwin Griswold was involved in one instance that I remember most vividly. He was, himself, a former Solicitor General representing the chemical industry. I remember him coming in and making an impassioned plea about how you—the Solicitor General’s office—have to change position. He was relying on the Chenery Doctrine, which states that the courts cannot uphold decisions by agencies on grounds that were not adopted by those agencies. He said, “On that basis, the rule has to be thrown out. The D.C. Circuit’s gone off the deep end.” And, I said to him, “Well, you know, there is another Supreme Court decision out of the National Labor Relations Board that says that the doctrine was never meant to turn this process into a ping-pong tournament.” He turned as bright red as anyone I had ever seen. But, significantly, when the time came for the Solicitor General to decide on the right thing to do, he refused to confess error. Rex Lee refused to shift position.

In fact, we consistently opposed Supreme Court review in those cases. There must have been at least a dozen such cases over the time that I served in the Solicitor General’s office, and Supreme Court routinely denied those petitions for certiorari. So to the extent people believe that when administrations change, you are going to see a huge litigation shift as a consequence, let me suggest to you that this is not likely to happen. And I do not think the current Solicitor General is going to be any more responsive to the entreaties of, for example, environmentalists or other groups who are this President’s constituents, than Rex was to the business community. That is one half of the equation for the change in administrative law that is or, more accurately, is *not* to come.

The second half of the equation is another case that, like the *Fox*

Television case, is near and dear to my heart. Again, I will tell you where I stand so that you will recognize that I am not speaking here as a dispassionate person. I am an advocate. I have a case before the Supreme Court right now called *American Chemistry Council v. The Sierra Club*. This is a case that is a slight variant of the one I described to you earlier. This case emerges from a decision of the Environmental Protection Agency, in 1994, to enact an exemption from some very onerous environmental restrictions in the Clean Air Act. The exemption applied in situations where a plant was either starting up or shutting down or was experiencing a malfunction. In those circumstances, if the EPA had imposed the most rigorous environmental restrictions, frankly, the affected plant would always have been in violation of the statute. And, since the Clean Air Act carries criminal penalties, this was a matter of some importance to the business community. That 1994 exemption ruling had a fair number of bells and whistles that went with it which, roughly speaking, made the exemption less helpful to the business community. I will try to keep this discussion at a high level of generality because you do not want to learn EPA rules in this particular setting. Basically, what happened is that in 2006, the previous administration's EPA decided to eliminate all of the exemption's bells and whistles. As a result, the Sierra Club went to the D.C. Circuit to challenge the EPA's decision to eliminate the bells and whistles; but it also wanted to challenge the underlying rule that granted the exemption in the first place as inconsistent with the governing statute, the Clean Air Act. Interestingly, that Act provides that if you want to challenge a rule issued by the EPA, you must do so within sixty days. If you fail to challenge the rule in that period of time, your challenge is supposed to be barred. The statute is as plain as I just described it. Despite my earlier disclosure, I do not think I'm being an advocate when I say this. I think that is the best reading of the statutory scheme. Well, the D.C. Circuit, obviously not completely comfortable with that rigidity, decided some years ago that despite the statute's plain language, there would be what the court called a "constructive re-opener." That is, if the agency sufficiently alters a regulation, members of the public get another sixty days to challenge the rule. Now, I would question whether the bells and whistles on the regulation I am discussing were significant enough so that, based on their elimination, the parties involved would have a different stake in the regulation that would justify allowing them to go to court and reopen the regulation to legal challenges. I have to say that a small part of me eagerly anticipates hearing the federal government defend this approach in front of Justice Scalia, for instance. He is somebody who might have some different, and might I say, strongly held and expressed views about how plain language should be read and thus how all of this ought to play out.

In any event, this case went to the D.C. Circuit, the D.C. Circuit used this particular “constructive re-opener” standard. It allowed the challenge to the 1994 rule, and struck down the rule on the ground that it exceeded the EPA’s authority under the statute. My firm filed a petition for certiorari to the United States Supreme Court on behalf of the chemical industry.

The question then, is what does the Solicitor General do in that situation? Obviously, the Solicitor General and this administration are not all that fond of the rule, and would be perfectly happy to have it knocked out. On the other hand, from their perspective, as an institutional matter, it is not necessarily the best thing in the world to be faced with a legal rule that says, “If you play with one aspect of a regulation that may reopen another aspect of that same regulation.” In fact, there may be a lot of existing rules that this administration strongly supports and would prefer that polluters remain unable to challenge because the sixty-day period has run. So, the D.C. Circuit’s new legal rule is a two-edged sword; it is like a lot of procedural rule. Sometimes they help you and you love them, and sometimes you hate them.

In this situation, we went to the Solicitor General and said to her, “This is a much more serious issue with repercussions well beyond this case. First of all, you should have filed a petition for certiorari yourself,” which she did not do. Second, we said, “If you do not do that, you should at least support the petition that we’re going to file.” Now the reason that this is at the very top of my mind at the moment is that I got the brief by the Solicitor General yesterday, read it on the flight down here, and it is fascinating. Basically, Solicitor General Kagan says, “The D.C. Circuit is dead wrong; this is not the way they are supposed to interpret statutory language, but the Court should not take the case because the issue is not that big a deal. We can live with it because this kind of re-opener does not come up all that often, we can litigate, etc.” Not surprisingly, the environmental groups and their opposition took a slightly different tact, which was that this reopener process is the greatest thing since sliced bread, and the courts should love it.” It will be very interesting to see what the Supreme Court does with this particular issue. As I say, I can certainly imagine that Justice Scalia will take a dim view of the reopener doctrine and its consequences for finality. On the other hand, about eighty-five to ninety percent of the time, the Solicitor General gets the result she wants in submissions to the Supreme Court. So, I am not standing here saying, optimistically, “I think the Court will take the case.” I will say, optimistically, that if they do grant certiorari in that case, then I would be pretty hopeful as to its outcome.

Now, I am going to do a bit of a detour, here, because the other

point that the Solicitor General made in opposing our petition for certiorari was that there is no split in the circuits on the question presented. Those of you who are not Supreme Court advocates or Supreme Court followers would not necessarily know that the Supreme Court has an extraordinary obsession with conflicts in the Circuits as the sine qua non for granting certiorari. Again, I am an advocate, and I make a living by getting cases to the Supreme Court, so this rule hits me where it hurts. But, what I want to emphasize here is that the rationale for the rule seems, to me, to have lost a lot of its currency today. And this is a point that I have been wanting to make in a variety of settings, so I am going to make it here because I have never had a chance to say it before.

There are two rationales for the Court's approach. The first is that the Supreme Court has a lot of respect for lower court decisions and wants to give the lower courts an opportunity to evaluate a particular problem and provide the Supreme Court with insights on both sides of an issue. Therefore, the Court waits until the issue has percolated. At that point, a petition can bring the issue to the Court's attention and the Court will grant certiorari. The problem with that is that at almost no other time in its history has the Supreme Court been less inclined generally to defer to the views of lower courts. They are not discomfited by deciding that a rule that has been adopted by twelve Courts of Appeals is wrong. I will concede for purposes of argument that the current Supreme Court may be the smartest group we have seen on the Court in many years, but it is at least inefficient for the Court and advocates to have to wait to hear from Courts of Appeals before bringing issues to the Supreme Court when the Court itself is so little inclined to defer to the views of the lower courts. Indeed, it is with some caution that I make reference to a Court of Appeals decision, concerned that the Court will say, "That's not one of our decisions, is it?" Advocates only make that mistake once. My point is simply that in this age of limited deference to courts of appeals, the need for percolation does not work all that well as a basis for delay in the Supreme Court's resolution of important and difficult issues.

The second rationale for insisting on conflicts among the Circuits is that, absent percolation, the Court might not hear both sides of an issue effectively presented to it. This argument made much more sense twenty or so years ago. Prior to the mid 1980s, the notion of a specialized Supreme Court bar did not exist. At that time, it was much more common than not, approaching almost ninety percent of the time, that whoever was arguing in front of the Court would be making his or her first and only argument Supreme Court argument. In addition, in those days, it was much less common for *amicus curiae* to file briefs in support for

one side or the other. And so, it seems to me, in that context, the Court would legitimately be very concerned about whether it was going to see all the sides of whatever issue it was deciding. Under those circumstances, it made sense for the Court to insist that the Courts of Appeals had become entrenched in some kind of well developed conflict before weighing in.

The problem with that rationale today is that we now have a specialized bar, and there exists a highly specialized amicus machine that cranks out briefs in virtually every case that reaches the Court. The notion that the Court is not going to get every conceivable angle on any case is quite improbable. And, under those circumstances, it seems to me, the Court ought to modify its standards for granting review, and worry less about whether there is a conflict in the Circuits and somewhat more about whether or not the case presents an important issue where the Nation would be better served by having an answer provided sooner rather than later.

Now, the consequence of accepting that analysis is that the Court's docket would probably go from about 75 cases per term to 115 cases. I, and others in our practice, would, of course, benefit from that immensely, and that would be a very positive development, in my view. I know that I have a personal stake in the outcome of this particular issue, but I also believe that there are many cases and situations in which the judicial system and the Nation would benefit from greater certainty sooner.

The case I was describing above involving the "constructive reopening" rule seems to be a perfect example of the kind of case where the Court should recognize that it does not really need a split in the Circuits to know that it should resolve the issue. Indeed, it is unlikely that the Court will ever be confronted with a split in the Circuits because these kinds of administrative law cases almost invariably go through the D.C. Circuit. That means that either I or some other advocate will have to wait until somebody can get the issue raised and decided in some other Circuit. I will probably be long gone and retired before that happens. So, it would be interesting to see how the Court rules on the petition. I do not think I said it exactly this way in my reply brief, but I will suggest to you, as I did to the Court, that this petition presents an issue of overarching significance that does not need a conflict in the circuits to justify its resolution by the Supreme Court.

Now, that brings me to the *Fox Television* case, which presents a fascinating situation, and not just because it involves an interesting subject matter. Most of you have probably heard a little bit about it, so I will give you only a thumbnail sketch. Fox Television was one victim of the

indecent regime that the Federal Communications Commission adopted. Indecency became a major issue back during the term before I clerked at the Supreme Court, the 1977 term, in a case called *FCC v. Pacifica*. There, George Carlin, a comedian, performed a routine called the “Seven Dirty Words,” which was broadcast on radio in the middle of the day. Some horrified young child and his father complained bitterly, and the case made it all the way up to the Supreme Court. Interestingly enough, Justice Stevens wrote the opinion, not for the majority, for a plurality as it turns out, in which they barely uphold the FCC’s punishment of the radio station against the First Amendment challenge. There is a separate concurring opinion by Justices Powell and Blackmun which says, “Look, it is one thing when you have this kind of shock treatment or exposure through the public airways, we agree that can be regulated. But, that is not to suggest that mere fleeting use of expletives would, in any way, pass constitutional muster.”

Surprisingly, the industry took that reasoning to heart, or maybe not surprisingly, and it continued to operate under a regime in which it did not use shocking expletives generally, but was perfectly content if occasional expletives would sneak out during its programming. And if you look at the next twenty-five years, there are instances, usually on radio not on television, in which expletives made their way onto the airways; and the FCC, taking what it called a “restrained approach,” tended not to do anything about those events.

Unfortunately, you arrive in the modern day and get the situation where Bono gets up on national television and expresses his enthusiasm for winning an award using the f-word. (Again, if people want the real word, let me know, but I will use euphemisms for these purposes.) And then, of course, Cher was soon to follow. She took the podium during televised national music awards, and suggests that those who have criticized her over the years, well, f- them. At that point, the FCC gets agitated. And, then, Nicole Ritchie comes to the same television show the next year and talks about trying to get cow manure out of a Prada bag, except using the more explicit language, and talking about how difficult that can be. You will recognize that this is, of course, why I went the law school: to defend these First Amendment rights.

Now, the FCC’s view of the world became particularly intense when Janet Jackson’s famous “wardrobe malfunction” occurred. At that point, of course, the sky was the limit; there was a dramatic, sustained over-reaction. There were massive numbers of complaints filed with the FCC. There are groups that, apparently, do nothing but watch television. Members of these groups apparently hear an indecent word on television, and then send blast emails to the FCC objecting to the use of a

particular word. The FCC then sends out a letter of inquiry, and the television station has to look at the tape, and figure out whether somebody said anything objectionable. About ninety-five percent of the time, those complaining have simply misunderstood what word was broadcast.

In any event, after the broadcasts described above, the FCC came after Fox and issued an order saying that the use of the language by Nicole Ritchie and Cher violated the Indecency Laws. Fox challenged that determination and the issue went to the Second Circuit. It was an interesting debate—whether to go to the D.C. Circuit or the Second Circuit. In fact, in the first go-round in the Second Circuit, Fox prevailed 2-1. I know that at this point, you are all wondering what this has to do with the topic, and I will get to it. But, first, the court's 2-1 decision narrowly concluded that the FCC's change in its enforcement approach (from tolerance to prosecution) was not adequately justified as a matter of administrative procedure. And that holding was followed by a wonderful eight pages of dicta, expressly labeled by the court as dicta. That dicta explains that even if the FCC tried to explain its change in policy, it would not be upheld because the policy itself violates the First Amendment.

Judge Pierre Leval who is a genuine intellectual titan on the Second Circuit, wrote a dissenting opinion in which he said, "I am not going to deal with that constitutional analysis because that is dicta, but I have to tell you, I think the agency justified its change in position adequately, largely on the basis that it felt constrained by *Pacifica* for twenty-something years, but now it reads *Pacifica* differently and thinks it has a little more discretion than it had. That is an adequate—not a great—reason but good enough for 'government work.'"

After reading the decision, I thought, "Well, this does not sound like the kind of issue that the Supreme Court would be interested in. Indeed, it is not the kind of issue that I would necessarily think a federal agency or the Solicitor General would be inclined to take to the Supreme Court." But, much to my chagrin, the Solicitor General, in fact, authorized the filing of a petition for certiorari. The FCC took the case up to the Supreme Court on a very narrow issue, just the Administrative Procedure Act issue, specifically, whether or not the explanation was adequate under the circumstances, expressly eschewing any discussion on the First Amendment issue in the petition.

We, not surprisingly, opposed certiorari on the grounds that this holding is pretty fact-specific: The question of when agencies can switch course is a matter that has been well-developed in the case law. The Supreme Court had decided the *State Farm* case some years ago and laid

out the basic ground rules for that kind of switch in position by an agency, and it did not really require more elucidation at this stage. And, in any event, we explained, the Second Circuit sent the case back to the Commission. The Commission thus could provide an adequate explanation for its change in policy and then come back through the process, and try to defend against the First Amendment challenge at that stage.

Much to my chagrin and disappointment, the Court granted the Solicitor General's petition. Clearly there was no split in the circuits on any particular issue in that case. I did ask the Solicitor General why he had gone down this path because, normally, the Solicitor General is the "filter" for cases involving the United States getting to the Supreme Court. Any such case has to go through the Solicitor General. There are a couple of exceptions to that rule that involve independent regulatory agencies. The Federal Communications Commission does have some independent litigating authority. The statute is unclear about it, but it could be read to authorize the Commission to file a petition that the Solicitor General has not joined. And so what the Solicitor General suggested was, in that circumstance, he felt that his discretion was slightly more constrained than it might be in a situation where it was exclusively his choice whether or not to take a case to the Supreme Court.

The significance of this is obvious, or maybe not obvious, but important. The case goes to the Supreme Court, and the Court hands down its opinion. Justice Scalia wrote the opinion, perhaps suggesting to you that, probably, my position on indecency did not fare all that well at the Court. And basically, he said two things which bear on the issue of what change is coming in administrative law and how it will fare at the Court. One, he said that the standard by which a court determines whether an agency has provided an adequate explanation for changing positions is extremely deferential and that courts do not and should not expect much out of them by way of explanation. If the agency's explanation is that it thought that *Pacifica* required them to take one position then, and that it has concluded that it was wrong about *Pacifica* now, that is an adequate explanation. Second, and I think probably more controversially, he rejected the argument that where you are talking about content-based regulation of speech protected by the First Amendment, courts ought to require the agency to provide a more detailed explanation for that regulation than the court would require of an agency regulating oil or gas or railroads or some entity like that. We argued that if an agency wants to change its mind and take a little weight from the railroad, that's one thing. But, if the agency wants to alter its regulations to restrict speech, that ought to be something different—something that the agency has to explain more thoroughly than simply stating, "ta-da."

Unfortunately, as noted, the Court rejected that argument. I was and am slightly surprised. I would have thought that the Constitutional Avoidance Doctrine would generally have some weight in this particular debate, but the Court refused to apply it.

Another interesting aspect of the case involves Justice Kennedy who, as often happens, was the pivotal vote in this particular case. He did not join the majority on the core question of when, under the *State Farm* formulation, agencies can get away with changing their positions with minimal explanation and writes what I have found to be an exceedingly complex analysis of the issue. He says—he doesn't use this phrasing, obviously—that I know an adequate explanation when I see it, and I see it here. But I did not see in his complicated, fact specific analysis guidance for agencies in the future as they try to figure out when they are going to change position and how much explanation will be sufficient. One bright line rule did emerge: An agency at least must acknowledge that it has changed its position before it can actually do so. That is not a particularly burdensome requirement for the agency to satisfy. And, frankly, we will have to see what happens in the wake of the Kennedy concurrence as to how the courts of appeals will deal with it in its practical implementation. Will they change how they analyze this question, or will they say that nothing came out of the *Fox* opinion that really moves the ball other than, obviously, that the court should have addressed the First Amendment issue.

That said, you also have to wonder if this problem is affected by the context in which it arises. That is, will this Court view all changes in agency position through the same deferential lens? Different justices may view different shifts in agency positions as more or less warranted under related regulatory and statutory regimes and in light of different constitutional provisions. We will have to wait and see if *Fox Television* really represents a sea-change in administrative law or is just a curiosity of its unique setting. I suspect there will be Courts of Appeals that say this decision did not change the law much, that will go back to the *State Farm* formulation, and that will require the agency to spend more time justifying changes in rules than they have in the past.

I realize I am running toward the end of what I was allotted by way of time, but my partner and good friend, Newt Minow, who was the chairman of the Federal Communications Commission and, therefore, a dutiful regulator in the Kennedy administration, said that there are two things that you have to do when you give a keynote speech. You have to start with a funny story and you have to end with a funny story. So, I am going to end with my favorite funny story, or one of my favorites. It only connects with the subject matter here because, just as Justice Ste-

vens wrote *Pacifica*, he also wrote the major dissent in *Fox*; and since he is probably on his last term in the Court, I want to pay a tribute to him. He was, in my judgment, the best hypothetical questioner on the Supreme Court throughout the thirty-something years that he has been there. My absolute, dead-on favorite hypothetical question that the Justice has ever asked was in a case called *NCAA v. Tarkanian*. Now, I suspect that the law students in the audience are going to look at me, saying, “huh?” Those of you who follow basketball religiously will know who Tarkanian is, but a lot of people will not; this is generational. Tarkanian was, without question, the biggest alleged violator of the NCAA rules in the history of sport. He was the coach at the University of Nevada, Las Vegas, and ultimately, the NCAA caught up to him and told UNLV that it had to fire him or cease playing NCAA sanctioned basketball. UNLV fired him, and not surprisingly, he was not thrilled by that action, and brought a lawsuit. Now, he loved UNLV and did not want to sue the University of Nevada; what he wanted to do was to sue the NCAA. He brought a civil rights action under 42 U.S.C. § 1983, which is the Civil Rights Statute. That statute, of course, requires state action. And, therefore, the issue in the case was whether or not the NCAA is a state actor, because of its close interrelationship with UNLV and other state schools. Our firm was representing the NCAA, and Rex Lee, actually, was arguing the case on behalf of the Association. But the hypothetical did not come up during Rex’s presentation; it arose when Tarkanian’s lawyer was arguing. This argument occurred back in the mid ‘80s, so this was going to be that lawyer’s one and only argument, I think, in the Supreme Court. And he was up there, and Justice Stevens asked him the following hypothetical: Mr. Jones, what would you say about this situation. Let’s assume that O’Hare Airport—which is a municipally run airport—went to the manager of United Airlines and said to them . . . no wait, sorry, the other way around. United Airlines goes to the O’Hare airport officials and says, “Look, we don’t like the guy who is handling our particular terminal. If you don’t fire him, we’re going to take all of our airplanes and go to Midway Airport.” In that situation, would United Airlines be a state actor?

I do not know if you can see me because of the way the lights are in this room, but I am assuming you can. Tarkanian’s lawyer’s response was to stare with an open mouth. I was sitting at council table and, to me, it seemed that he was there for about a minute like that. I am sure the time was shorter than that, but he did stand there for quite a while. And while he was standing there, Justice Scalia leans forward and says, “The answer you’re looking for is ‘no.’” Tarkanian’s lawyer, pretty sharp at this point, says, “No.” Justice Stevens leans forward and asks,

“Why?” Tarkanian’s lawyer looks at Scalia! Justice Scalia says, “You’re on your own, now.” And on that, thank you.

